United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2233

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2233

In the Matter of

CONTINENTAL VENDING MACHINE CORP.
and CONTINENTAL APCO, INC.,

Debtors.

JAMES TALCOTT, INC.,

Appellant,

IRVING L. WHARTON,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, JACOB MISHLER, CH. J.

APPELLANT'S BRIEF

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for Appellant
Office and P.O. Address
350 Fifth Avenue
New York, New York 10001
Telephone: (212) 736-1000

Of Counsel,
J.Jacob Hahn
Julius J. Abeson

INDEX TO BRIEF

TABLE OF CASES

TABLE OF CASES

STATUTES

TEXTS

STATEMENT OF QUESTIONS PRESENTED

I- Whether an improvement of some creditors' position is the natural consequence of substantive consolidation and not inequitable.

II- Whether it is fair and equitable to deny to any creditor an improvement of his position, accorded to all others as a natural consequence of substantive consolidation.

III- Whether a contractual provision, such as the one before the court, is sufficiently broad to allow, upon substantive consolidation, application of a creditor's security given by one debtor against the indebtedness of another.

IV- Whether a plan may be confirmed without findings of compliance with the Bankruptcy Act.

STATEMENT OF CASE

The debtors

Continental Vending Machine Corporation (Continental) is a publicly owned Indiana corporation. It evolved from a predecessor founded in 1944 by Harold Roth and his family. (Record Document 3 p.5) Its business expanded over the years into a national conglomerate of some twenty active subsidiaries, mostly wholly owned (Id. 6).

By proceedings before and after September 30, 1962, all active subsidiaries were dissolved, Continental taking over their assets and liabilities. One inactive wholly owned New York subsidiary was activated in December 1960 and its name was changed to Continental Apco, Inc. (Apco) (Id. 6). Thus at all relevant times there remained Continental and its wholly owned subsidiary, Apco, the two debtors in this proceeding.

The debtors' business was manufacture, design, operation and sale of coin-activated cigarette, beverage and food vending machines and operation of music vending machines. (Id. 5, 38a)

Continental designed and manufactured the vending machines which were installed and operated on vending routes throughout the United States. Each route consisted of a cluster of locations at which the vending machines were placed pursuant to contracts with owners of the locations such as theatres and stores. Each route was contained in a particular geographical area, hence known as

San Francisco route, Buffalo route. Each route was thus made up of vending machines, location contracts and an inventory of the items dispensed by the machines.

Apco acted as Continental's sales arm. It sold the machines and parts manufactured by Continental to the subsidiaries and the general trade. (Id. 6)

Some 4,000,000 shares of Continental's common stock, $.10 par value, were issued and outstanding among 5,600 holders. Roth and another owned and controlled approximately 1,500,000 shares or about 36% of the outstanding common stock. (Id. 7)

Continental sold over $5,000,000 in principal amount of its 6% convertible subordinated debentures. Roth and his associates owned and controlled approximately $2,100,000 of such debentures. (Id. 7,8)

Roth was Continental's president, board chairman, director and principal stockholder. Roth's mismanagement and other questionable activities seriously affected Continental's financial condition and brought about inability to meet its obligations and commitments in the spring of 1963. (Id. 9) Failure to pay taxes, investigation by the Internal Revenue Service and by Amex resulted in suspension of trading in Continental's securities. Investigation by the Securities and Exchange Commission followed. (Id. p. 10)

Conservator and trustees

On the application of the Securities and Exchange Commission, on April 8, 1963 an order was entered in the United States District Court for the Southern District of New York appointing John P. Campbell Conservator for Continental. (Id. 10) He continued the operations of both Continental and Apco, although Apco was not brought within the proceeding.

On July 5, 1963 an involuntary petition in bankruptcy was filed against Continental in the Eastern District of New York. This proceeding for bankruptcy adjudication was supperseded on July 10, 1963 by filing in the Eastern District of New York of an involuntary petition against Continental for reorganization under Chapter X of the Bankruptcy Act. (Id. 11) The petition was approved by order of July 12, 1963, which appointed John P. Campbell and Irving L. Wharton trustees. They continued operations of both Continental and Apco, although Apco was not brought within the reorganization proceeding.

On October 4, 1963, an involuntary Chapter X petition for reorganization was filed against Apco. The petition was approved on October 10, 1963 and Continental's trustees were appointed trustees for Apco.

Upon resignation of John P. Campbell on September 14, 1964, Irving L. Wharton continued as sole reorganization trustee for both debtors. (Id. 34) He is the appellee.

Appellant, Talcott

James Talcott, Inc. (Talcott), a New York corporation, was the principal financer of the operations of Continental and Apco. It made loans and advances to the debtors, all on a secured basis. As security for the obligations of Continental, Talcott received mortgages and other security devices covering vending machines on location, assignments of location contracts, liens on machines in warehouse and in other places off the routes.

As security for the obligations of Apco, Talcott received assignments of accounts receivable created by Apco sales, chattel paper and liens on vending machines returned by customers.

All obligations of Continental and Apco were covered by written security agreements each containing a provision (67a) that any and all security held thereunder by Talcott for a specific obligation arising under such agreement, stood as security also for any and all other obligations of Continental and Apco respectively, whether arising under the particular agreement or under any other agreement and whether then existing or thereafter created. Thus, whatever property of Continental came within the orbit of Talcott's security interest stood as security for any and all obligations of Continental. And this was also true with respect to Apco's property held as security by Talcott.

At the time of the appointment of the Conservator, Continental's obligations to Talcott approximated $3,500,000 and Apco's obligations approximated $2,000,000.

Upon commencement of the conservatorship for Continental and successive reorganization proceedings of Continental and Apco, Talcott began and thereafter continued liquidation of its security for the satisfaction of the debtors' indebtedness to it. The result was a $380,000 surplus in the Apco account (67a) and a $820,000 deficiency in the Continental account. (68a)

While liquidating its security, Talcott made urgently needed loans to the Conservator: $300,000 on April 22, 1963; $175,000 on May 29, 1963. These were secured by Conservator's certificates. (Record Document 3, p. 13). On June 28, 1963, Talcott loaned Apco $200,000, later secured by trustees' certificates. (Id.p.14) Talcott also made urgently needed loans to the trustees: $650,000 on August 14, 1963; $750,000 on December 4, 1963. These were secured by trustees' certificates. (Id. p.15-16). On these loans, approximating $2,000,000 and secured by the certificates, there remained, as of December 31, 1971, an unpaid balance of $875,487.22, inclusive of interest. With accrued interest to date, the balance is over $1,000,000.

Trustee's plan of reorganization

As early as 1964, it became apparent to Talcott's counsel and he advised the trustee, Wharton, that the affairs of the two debtors were so intertwined that their assets and liabilities and the two proceedings would have to be consolidated. (55a). After his own investigation, the trustee came to the same conclusiion.

After numerous extensions of time for so doing, the trustee filed his report pursuant to section 167(5) of the Act on June 13, 1969 (Record Document 3). He reported (4a): There is no longer any business to be reorganized. A plan of reorganization providing for liquidation would be preferable to an adjudication in bankruptcy. The debtors were operated as a single economic unit. Any plan of reorganization should provide for a merger of their assets and liabilities and a consolidation of the two proceedings.

Accordingly on June 20, 1969, the trustee filed a consolidated plan of reorganization, actually liquidation (5a-24a): Claims against both debtors were treated "on a consolidated basis". (6a). All assets of the two debtors were treated "on a consolidated basis". (9a). All properties of the two debtors and their subsidiaries were to be dealt with "on the basis of a merger or consolidation thereof". (10a). Creditors secured by specific liens against the debtors' property and proceeds of sale thereof (Class 5) were to be paid out of the security; if insufficient for that purpose, the

secured creditors shall become unsecured creditors (Class 8) for the deficiency. (13a).

The notice of hearing on the plan did not specifically mention hearing on consolidation. To supply the omission the trustee obtained an order on June 23, 1969 amending the notice of hearing. In his application for the order (25a-26a), the trustee represented, inter alia: "(a)...Apco had, in fact, no separate economic existence, was not adequately capitalized, and constituted a mere instrumentality of the parent corporation, i.e., a separate corporate pocket or department of the parent and its business; (b) the operation of the separate entities in reality constituted a single enterprise in an economic sense". And Apco's officers and directors were not independent but were dominated by Roth. (25a).

The trustee further represented: There was such a complex pattern of fund transfers between the two debtors and of guarantees and cross-guarantees of each other's obligations that separation of their assets andliabilities was "virtually impossible". There was little likelihood of successful attempt to reconstruct inter-company transactions. (25a) The cost of such an attempt might exceed $1,000,000, with no assurance of success "regardless of the amount of money, time and effort" expended. (26a).

The trustee concluded that a merger of the assets and liabilities and a consolidation of the proceedings will afford "a fair, equitable and feasible solution to the insoluable problems resulting from the indiscriminate manipulation of the debtors, and their finances". (26a).

Trustee's amended plan

After the amended notice of hearing, Talcott's counsel, relying on Chemical Bank New York Trust Company v. Kheel, 369 F. 2d 845 (2 Cir. 1968), advised trustee's counsel that by virtue of the proposed substantive consolidation, Talcott asserted the right to apply the Apco surplus against the Continental deficiency. Trustee's counsel reported Talcott's contention at the August 6, 1969 hearing. (27a, Record Document 7).

Further hearings were held on September 26 and October 31, 1969. (Record Document 8 and 9) On September 26, 1969, there was testimony on the plan. Conclusion of hearings was delayed by various matters and controversies requiring amendments of the plan. The final hearing was on June 5, 1970 (Record Document 10). Additional testimony was adduced (Id. 40-81) and trustee's counsel again referred to Talcott's contention as to the effect of consolidation. He characterized Kheel as "a landmark case" (27a); stated the need for specific provision in the plan to preclude Talcott's contention as to the effect of consolidation, without which provision he would not recommend the plan (29a); and set forth the proposed

precluding amendments (31a-33a), which he claimed are not "counter to what the Court of Appeals decided (in Kheel) because the Court of Appeals was never called on to decide whether or not a plan which provided that there could not be a crossover of liability was correct or appropriate or not". (35a).

The amended plan was filed on June 15, 1970 (Exhibit A to Record Document 5). The relevant amendments: Claims against both debtors are treated on a consolidated basis "except for Claims of Secured Creditors". (36a). Properties of both debtors and their subsidiaries are dealt with on a consolidated basis, "without prejudice to the rights of Secured Creditors with respect to specific collateral securing specific indebtedness". (36a-37a). Secured creditors (Class 5) are to be paid out of their security, becoming unsecured creditors (Class 8) for any deficiency, with the proviso, "Anything herein contained to the contrary notwithstanding, nothing in the Plan shall be, or be deemed to be an elevation or improvement of the status of a claim filed by any creditor in Class 5 as a result of the consolidation of the Debtors' Estates". (37a).

Approval of amended plan

On May 20, 1971, an order was entered approving the amended plan (Record Document 5), with findings. (38a-42a). Except for a finding that $300,000 rather than $1,000,000 might be the cost of a futile attempt to reconstruct the inter-company transactions (40a), the relevant findings substantially conform to the trustee's

representations (p. 8 infra): Virtual identity of the boards of directors and officers and their domination by Roth (39a); complex pattern of fund transfers, indiscriminate guarantees and and payments of each other's obligations (40a); a single economic enterprise, Apco having no separate economic existence, a mere instrumentality of Continental and operated as its division or department (41a). The order concludes that there should be a consolidation of assets and liabilities and the amended plan is fair, equitable and feasible. (41a).

Talcott's objection to confirmation of amended plan

On January 14, 1972, Talcott filed its objection to confirmation of the amended plan. (42a-46a). It alleged that: At the end of 1964, it filed a secured claim and, on information and belief, it is the sole secured creditor in Class 5 and it did not accept the plan (43a). By virtue of consolidation and under the applicable provision in its financing agreements, it is entitled to treat the properties of the two debtors "as one and indistinquishable and to apply the Apco surplus against Continental's deficiency". (45a). The amended plan "is discriminatory as to Talcott, improperly denies it the full realization of its security, to which it is entitled as a result of the consolidation, and hence not fair and equitable within the meaning of Section 221(2) of the Bankruptcy Act, and ... it fails to comply with the protective provisions of Section 216(7) of the Bankruptcy Act. (46a, 64a-66a).

Order confirming the amended plan

After a hearing on January 21, 1972 (Record Document 11, 46a-64a), extensive briefs were filed (Record Documents 12 through 16). On August 12, 1974, an order was entered overruling Talcott's objections and confirming the plan. (64a-71a). This is the order appealed from (71a).

The Court held: "Talcott's reliance on Kheel is misplaced." (69a-70a). Talcott does not have a lien on the Apco surplus for the Continental deficiency, under its contractual provision and by virtue of consolidation. (67a-69a). The plan is fair and equitable and satisfies the condition of Section 221(2). (71a).

Prior appeal

On September 25, 1972, Talcott applied for an order directing payment of the balance due on the Conservator's and trustees' certificates. The application was denied and Talcott was directed to file an accounting of the moneys it received on liquidation of its security and from other sources. Talcott appealed and in a comprehensive opinion by Judge Mansfield filed January 24, 1974, the matter was remanded for further proceedings. 491 F. 2d 813.

One of the issues on that appeal was whether Talcott was obligated to apply the Apco surplus to payment of the certificates, Talcott contending, as it claimed in its objection to confirmation of the amended plan, that the Apco surplus is applicable to the

Continental deficiency. Another issue involved the construction of the August 14, 1963 agreement for the $650,000 loan to the trustees. This court held, 491 F. 2d at 821:

> "... in view of the fact that the district court is presently considering exactly the same contention - that Talcott is entitled to treat the debts of Continental as the debts of Apco - in connection with Talcott's objection to confirmation of the trustee's reorganization plan, a decision by us on this matter would be premature. Talcott will have every opportunity to appeal on this issue if on remand the district court reverses its prior construction of the August 14, 1963 agreement but refuses an order directing payment on the certificates on the ground that the underlying indebtedness should have been reduced from the funds collected by Talcott on Apco's accounts receivable."

Commencement of the further proceedings on remand was long delayed. The controversy involving payment of the certificates and Talcott's accounting remains undetermined. Judge Mishler recused himself on the construction of the August 14, 1963 agreement and referred it to Judge Judd, before whom no hearings have been held.

Pursuant to this court's opinion, 491 F. 2d at 821-822, and Judge Mishler's order, Talcott filed a proof of claim for its legal, auditing and collection expenses incurred on liquidation of its security. Judge Mishler referred this claim to United States Magistrate Catoggio, as Special Master, before whom hearings are continuing.

Talcott's objection to confirmation of the plan having been determined prior to determination of the other controversies on remand, the result of the instant appeal will determine whether, on its pending accounting, "Talcott is entitled to treat the debts of Continental as the debts of Apco" and to apply the Apco surplus against the Continental deficiency.

ARGUMENT

I- IMPROVEMENT OF SOME CREDITORS' POSITION IS THE NATURAL CONSEQUENCE OF A SUBSTANTIVE CONSOLIDATION AND IT IS NOT INEQUITABLE.

One of the results of every substantive consolidation is that creditors of one debtor with little or no assets are afforded improvement in their position by participating in the assets of another debtor. By the same token, creditors of the debtor with larger assets are disadvantaged by reduction of their distributive shares because of the added claims of creditors of the debtor with smaller or no assets. Such results are inevitable, they inhere in any merger of the assets and liabilities and are accepted out of necessity to satisfy the demands of equity "to reach a rough approximation of justice to some rather than deny any to all." Chemical Bank New York Trust Company v. Kheel, 369 F. 2d 845, 847.

In this Kheel case, the Government had a claim against a corporation with little assets. It moved for consolidation of its debtor with a number of subsidiaries with larger assets. Consolidation was granted upon findings almost identical with those here, with the recognized and unquestioned result that the Government's claim "will necessarily be enhanced by having the assets of all these corporations thrown into hotchpot". (Friendly, C.J., concurring, at 848).

Judge Friendly noted that the Government's "argument for equality has a specially"hollow ring" in view of the fact that, as the party moving for consolidation, the Government avowedly was seeking the enhancement of its position. There is no such "hollow ring" in Talcott's case. Consolidation was sought by the trustee. Talcott merely insists upon such an advantage as in varying degrees naturally flows to others from consolidation.

It is no answer to say, as the court does, (70a-71a) that, by the plan, Talcott "received exactly the treatment it bargained for." Talcott did not bargain for sharing Continental's assets with Apco creditors. Nor did Apco creditors bargain for sharing Continental's assets. Without knowledge of the intercompany relationships, the creditors of both thought, as did Talcott, that they were dealing with the respective separate entities. If the other creditors were misled or deceived in that regard, so was Talcott. By far the largest part of the consolidated assets in

the estate came from Continental. To Apco creditors the windfall is substantial.

The court's reliance on Kheel's admonished caution and misgivings is misplaced. The judges were addressing caution and misgivings to the exercise of the consolidation power. Once exercised, they did not stop to pick and choose for exclusion one or more creditors who might be benefited, who might be getting more than they bargained for. With full awareness of the enormous benefit to the Government, they approved consolidation in the larger interests of all creditors. The court below did just the opposite. Presumably, with Kheel's caution and misgivings, it also approved consolidation. Unlike Kheel, it picked Talcott for denial of the natural consequence of consolidation.

II - IT IS UNFAIR AND INEQUITABLE TO DENY TO ANY CREDITOR AN IMPROVEMENT OF HIS POSITION, ACCORDED TO ALL OTHERS AS A NATURAL CONSEQUENCE OF SUBSTANTIVE CONSOLIDATION.

Here, as in Kheel, consolidation makes a plan possible by achieving the following results:

> "By the order of consolidation, in effect the intercompany claims of the debtor companies are eliminated, the assets of all debtors are treated as common assets and claims of outside creditors against any of the debtors are treated as against the common fund, eliminating a large number of duplicative claims filed against several debtors by creditors uncertain as to which debtor was eventually liable.

"This makes possible what has heretofore not been feasible, determination, allowance and classification by the trustee's of claims of creditors..."

The trustee and creditors want the benefits of consolidation which makes the plan possible. Equity exacts a price for such benefits. It demands that the consequences of consolidation operate without discrimination as between secured and unsecured creditors, even if the secured creditors are thereby advantaged. Equality is the very essence of equity which attends bankruptcy administration.

The absolute priority rule is not limited in its application to priority of general creditors over stockholders. It applies as well "as between secured and unsecured creditors" and any violation of the rule renders the plan not fair and equitable. Collier, Vol. 6A, 14th ed., §11.06, pp. 613-615, and cases cited in note 27.

The amended plan is not fair and equitable because, as to consolidation, it discriminates between Talcott and general creditors and deprives Talcott of priority in derogation of the absolute priority rule. As to Talcott, the plan is not fair and equitable, section 221(2) of the Act, and does not comply with section 216(7).

III - A CONTRACTUAL PROVISION SUCH AS THE ONE BEFORE THE COURT, IS SUFFICIENTLY BROAD TO ALLOW, UPON SUBSTANTIVE CONSOLIDATION, APPLICATION OF A CREDITOR'S SECURITY GIVEN BY ONE DEBTOR AGAINST THE INDEBTEDNESS OF ANOTHER.

Whether Talcott has a lien on the surplus depends on the intent of the parties derived first and foremost from the language in the agreement. Kine Offset Process Co. v. U.S., 122 F. Supp. 343 (S.D.N.Y. 1954). The provision here gave Talcott a lien for

> "any and all obligations no matter how or when arising and whether under this or any agreement or otherwise..."

(a) "Whether under this or any agreement" is clear and unambiguous. The obligations secured are not restricted to those arising from the agreement of which the provision is a part. Nor are they restricted to any other agreement or any agreement at all.

(b) As clear and unambiguous is the phrase, "no matter how or when arising." The manner and time of the obligations' arising are unlimited and unqualified. The nature and source of the obligations are unrestricted.

(c) "Or otherwise" illumines still further the preceding expression of intent to secure obligations without limit or qualification as to their type, character, nature, derivation or factual or legal foundation. The words plainly enlarge and broaden the scope of the terms preceding them. In Schwartz v. Trajis Realty Corp., 56 F. Supp. 930, 932 (S.D.N.Y. 1944), the court considered the Federal Rent Regulation that prohibited removal

of tenants by any one of three specific means, "or otherwise." The removal in the case was not by any one of those specified. The Court nevertheless held it within the prohibition, stating:

> "...this is tantamount to saying that such a tenant shall not be ousted by any means or on any account whatever. If the section were differently interpreted, the word 'otherwise' would be robbed of its natural significance."

ACCORD: Carpenter v. Romer Tremper Steamboat Co., 48 App. Div. 363, 63 N.Y.S. 274, 278 (3rd Dept. 1900); In re Perry's Will, 126 Misc. 616, 214 N.Y.S. 461, 464 (Sur. Ct. Albany Co. 1926); People v. Reilly, 255 App. Div. 709, 6 N.Y.S. 2nd 161, 162 (4th Dept. 1938); Dunham v. Amaha & Commercial Bluffs Ry. Co., 109 F. 2d 1,3 (2nd Cir. 1939); C.I.R. v. Wilder's Estate, 118 F. 2d 281, 283 (5th Cir. 1941); In re Fowler's Estate, 43 N.Y.S. 2d 94, 105 (Sur. Ct. Westch. Co. 1943); U.S. v. Cleveland, 56 F. Supp. 890, 894 (D.C. Utah 1944); Buckley v. Buckley, 150 N.Y.S. 2nd 330, 335 (Sup. Ct. N.Y. Co. 1951); Clinton v. U.S., 260 F. 2d 824, 825 (5th Cir. 1958); Mortimer B. Burnside & Co. v. Havener Securities Corp., 25 A.D. 2d 373, 269 N.Y.S. 2nd 724, 726 (1st Dept. 1966).

> "The word 'otherwise' means 'differently' and the use of this word shows that a meaning was to be given to it different from the words preceding it... There is not any ambiguity in the words used or any obscurity in the meaning thereof.

> The use of the word 'otherwise' discloses a purpose to widen the scope of the section ..." People v. Reilly, supra.
>
> "The meaning of the phrase 'or otherwise' should not be restricted by the doctrine ejusdem generis..." Bowles v. Hayes, 155 F. 2d 351, 354 (3rd Cir. 1946).
>
> "'Otherwise' means 'In a different manner; in another way, or in other ways.' Webster's International Dictionary. Given their ordinary meaning in their context, the words 'or otherwise' broaden the scope of the restriction to the same extent as though all possible forms of action...had been included by name." Dunham v. Amaha etc., supra.
>
> "The words 'or otherwise' were intended to embrace and cover every and all means of succession or devolution in addition to that by assignment." Carpenter v. Romer etc., supra.

Talcott interprets the provision very broadly, as written and intended, to give it a lien for obligations of the widest possible scope and as urged in its statement, quoted and rejected by the court (67a-68a).

In reorganization as in other bankruptcy proceedings, the validity, amount, rank and status of all claims are determined as of the date of filing of the petition. 6A Collier on Bankruptcy (14th ed. 1971), sec. 9.05, p. 167; sec. 9.11, p. 244. At petition filed, Talcott had a valid lien on Apco property in its possession. To determine the status of Talcott's secured claim, the security had to be valuated. Bankruptcy Act, sec. 57h. Post-petition liquidation is the accepted method of valuation and

realized amount fixed the status of the claim. Shaw v. Walter Heller & Co., 358 F. 2d 353, 356, 358 (5 Cir. 1967) c.d. 390 U.S. 1003. Liquidation of the security resulted in a surplus. Under its contractual provision, Talcott had a lien on this surplus as a "sum" and "property" held by it to Apco's credit.

Talcott was under no duty to pay over the Apco surplus to the trustee immediately upon its creation. The agreement did not fix a time for such payover. It may be assumed that the payover was to be made within a reasonable time and what is reasonable depends upon the particular facts and circumstances of each case. The size, number and variety of the transactions and peculiar interrelationship between Continental and Apco left indefinitely open the possibility of then unknown obligations applicable against the surplus.

There is no quarrel with United States v. Phillips, 267 F. 2d 374, 377, (5th Cir. 1959) holding that when a debt is paid the lien is extinguished. (68a-69a). The court below misapplies this general rule to the particular facts in the instant case. As to Cichanowitz, 226 F. Supp. 288, 291 (E.D.N.Y. 1964), the distinguishing facts can be recognized without impairing the general rule that "the validity of a lien does not depend upon the existence of a contemporaneous debt, if the parties so agree." (68a).

Pending determination of an obligation, Talcott's lien on the surplus was one generally characterized as contingent or inchoate. These characterizations may be useful provided care is taken to distinguish between creation and enforceability of such a lien. The lien on the surplus was created by the agreement. The subsequent ascertainment of a debt subject thereto would merely make the lien ready for enforcement. Illustrative of the distinction are cases involving judicial and statutory liens. In re Unit Oil Co., 50 F. Supp. 264, 267 (D.Md. 1943), service of garnishee summons creates a valid lien; subsequent judgment makes it enforceable. The court there relied on Metcalf Bros. & Co. v. Barker, 187 U.S. 165, 23 S. Ct. 67, involving a lien by creditors' bill, and Taubel etc. Co. v. Fox, 264 U.S. 426, involving a lien by attachment. In these cases, prior valid liens, though inchoate until recovery of judgment, were upheld against bankruptcy trustees seeking to annul them under the then Bankruptcy Act, §67.

"Piercing the corporate veil" is not confined to bankruptcy administration. It has been applied in cases covering the whole gamut of the law to enforce substantive and procedural rights against one corporation by reaching the property of another and by otherwise treating parent and subsidiary corporations, as well as their officers and stockholders, as one. J.R. Foard Co. v. State of Maryland, 219 F. 827 (4 Cir. 1914), tort; In re Koizim, 52 F. Supp. 357 (D.N.J. 1943), lease; Reines Distributors, Inc. v.

Admiral Corp., 256 F. Supp. 581 (S.D.N.Y. 1966), Clayton and Robinson Patman Acts; Fisser v. International Bank 282 F. 2d 231 (2 Cir. 1960), arbitration; Worldwide Carriers Ltd. v. Aris S.S. Co., 301 F. Supp. 64 (S.D.N.Y. 1968), charter party; Higgins v. Smith, 308 U.S. 473 (1939), taxation; Tate v. Renault, Inc. 278 F. Supp. 457 (D. Tenn. 1967), affirmed 402 F. 2d 795 (6 Cir. 1968), product liability.

The findings here established a set of pre-petition facts operative to invoke piercing the veil. The facts found existed for an indeterminate period preceding the petition. Had Talcott's financing agreements with the debtors been terminated, the security liquidated, and the surplus and deficit established at any time prior to the petition, and had Talcott then ascertained the essential facts, it could, if it so chose, have brought an action to invoke the instrumentality rule for the purpose of enforcing its lien on the surplus for the pro tanto payments of the deficiency. And there is no reason to doubt the success of such an action under the last cited authorities.

The interposition of the bankruptcy proceedings brought about the same result as would a pre-petition action. Talcott filed a joint secured claim against both debtors. (43a). Where an action is required to enforce a pre-petition valid lien, filing a claim dispenses with it and the claim is treated as its equivalent. American Burner Co. v. Merritt, 129 F. 2d 314 (6 Cir. 1942).

IV - A PLAN OF REORGANIZATION MAY NOT BE CONFIRMED WITHOUT FINDINGS OF COMPLIANCE WITH THE BANKRUPTCY ACT.

This point is raised with reservations. It will not be pressed if, upon further consideration, it should be found without merit.

Section 221 provides that the judge shall confirm a plan if "satisfied" of certain requirements. The judge did state generally that he is so satisfied. (71a) However, the absence of any supporting findings gives pause, at least with respect to one matter. The plan was accepted by 71.8% in amount of the claims of general creditors. (Record Document 11, p. 40). The amount required is 75%. Bankruptcy Act, sec. 179.

V - CONCLUSION

Improvement of some creditors position is the natural consequence of substantive consolidation and it is not inequitable for Talcott to have such a benefit under the instant plan of reorganization. It is not fair and equitable to deny any creditor an improvement of his position accorded to all others as a natural consequence of substantive consolidation. To the extent that the instant plan denies Talcott such improvement, it is discriminatory, unfair, inequitable and violative of section 216(7) of the Act. The security provision in Talcott's agreement with the debtors is sufficiently broad to allow, upon substantive

consolidation, application of the Apco surplus against the Continental deficiency. The order appealed from should be reversed.

Respectfully submitted,

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for Appellant

Of Counsel,
J. Jacob Hahn
Julius J. Abeson

1 Copies Received
Date Nov. 25/74
Firm Weil Gotshal & Manges
By _____

1 Copies Received
Date Nov. 25/74
Firm Joseph J. Marchese.
By [illegible]

COPY RECEIVED
WEIL, GOTSHAL & MANGES
ATTORNEYS FOR [illegible]